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*Published in:*  
Edinburgh Law Review

*Publication date:*  
2014

*Document Version*  
Publisher's PDF, also known as Version of record

[Link to publication in Discovery Research Portal](#)

*Citation for published version (APA):*  
Raitt, F. (2014). Corroboration in cases of gender violence: A case for special treatment. *Edinburgh Law Review*, 18(1), 93.

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a more lasting victory for the principle of legality than for the principle of open justice, upon which legislative developments continue to trample. Parliament would have had to pay the political price for the continued expansion of infringements of open justice but that price, it seems, is not a high one. From the Scottish perspective, the question is settled. The 2013 Act, like the 2008 Act before it, applies unambiguously to proceedings in the Court of Session and the Rules of the Court of Session have been amended in order permit the use of CMP in proceedings under the 2008 Act.<sup>31</sup>

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EdinLR Vol 18 pp 93-97

## Corroboration in Cases of Gender Violence: A Case for Special Treatment?

Section 57(1) of the Criminal Justice (Scotland) Bill 2013 abolishes the legal requirement in Scots common law for corroboration of crucial facts in determining sufficiency of evidence in criminal cases. The section does not apply to statutory offences with a corroboration requirement. Abolition was recommended by the *Carloway Review*,<sup>1</sup> and the Scottish Government has made it a flagship reform despite the degree of opposition voiced in the consultation responses to the *Carloway Report*<sup>2</sup> and more widely in the media. The proposal has generated an unprecedented degree of caustic commentary and polarised perspectives. For example, in support of the need for abolition the former Lord Advocate, Dame Elish Angiolini, referring to the positive obligation on the state to provide an effective remedy in terms of article 13 of the European Convention on Human Rights, predicted that “[i]t will not be long before a victim in a case, which is marked ‘no proceedings’, will take the Scottish system to the European Court at Strasbourg” on the ground that the corroboration rule meant that “they are unable to obtain effective criminal sanctions in Scotland”.<sup>3</sup>

Opposition to abolition is frequently scathing. Most recently, Alistair Bonnington claimed that reform was being driven by “plainly flawed logic” whereby “[i]t is intended that the entire law of evidence should be altered to meet a perceived problem in sex cases”.<sup>4</sup> The burgeoning academic literature reflects a broad range

31 Chapter 96, inserted by the Act of Sederunt (Rules of the Court of Session Amendment No 6) (Counter-Terrorism Act 2008) 2008.

1 Carloway Review, *Report and Recommendations* (2011).

2 J Fawcett and S Mulholland, *Reforming Scots Criminal Law and Practice: The Carloway Report. Analysis of Consultation Responses* (2012), available at <http://www.scotland.gov.uk/Resource/0041/00410913.pdf>.

3 “Angiolini warning over corroboration”, *The Herald*, 21 July 2013.

4 “Corroboration law - why it should stay”, *The Times*, 26 September 2013.

of views, the majority of which are critical both of the concept of abolition and of the process by which the decision to abolish was reached.<sup>5</sup> Amongst the myriad complaints it is argued that the proposal lacks a sound rationale; is grounded in a dubious research base; is a populist gesture towards the victim-orientated agenda; and will inevitably increase miscarriages of justice.<sup>6</sup> Even commentators who do not consider that abolition will have an apocalyptic effect have been critical of aspects of the process leading to section 57.<sup>7</sup> Some academics, even if opposed to abolition, have considered the scope for types of evidence which may form an exception to abolition.<sup>8</sup> This brief article takes up the theme of partial abolition by considering the relationship between the corroboration rule and the acknowledged difficulties in investigating and prosecuting rape and domestic abuse. As this potentially incorporates a very large number of offences, subsequent references to rape and domestic abuse are intended to encompass all serious sexual offences and domestic violence and other seriously abusive behaviour from intimate partners or ex-partners. The analysis is centred on a single question: can special treatment for cases of rape and domestic abuse be justified? The article assumes that it is generally accepted that rape and domestic abuse raise particular difficulties for prosecutors due to their tendency to affect already vulnerable women in locations where independent witnesses are a rarity. However, it is argued here that such difficulties are not in themselves justification to dispense with corroboration. Rather, it is argued that regardless of conviction rates, hurdles to prosecution, or public perceptions of blameworthy victims, there is a principled basis of inequality that warrants special treatment for rape and domestic abuse cases. This is so, irrespective of whether abolition of corroboration for such offences made a difference to the number or outcome of prosecutions.

### **A. JUSTIFYING ABOLITION IN CASES OF RAPE AND DOMESTIC ABUSE**

In 2009 Lord Hope famously explained the emergence of distress as corroboration in rape cases as a necessary development without which it appeared that certain crimes in Scotland were “beyond the reach of the criminal law”.<sup>9</sup> More generally, the rules of evidence have gone some way to accommodating cases of rape and domestic abuse in which women are disproportionately the victims. It is this disproportionality – its

5 E.g. J Chalmers and F Leverick, “‘Substantial and radical change’: a new dawn for Scottish criminal procedure?” (2012) 75 MLR 837. For a helpful round up of the literature see F P Davidson and P R Ferguson, “The corroboration requirement in Scottish criminal trials: should it be retained for some forms of problematic evidence?” (2014) Int J of Evidence and Proof (forthcoming).

6 D Nicolson and J Blackie, “Corroboration in Scots law: ‘archaic rule’ or ‘invaluable safeguard?’” (2013) 17 EdinLR 152.

7 P Duff, “The requirement of corroboration in Scottish criminal cases: one argument against retention” [2012] Crim LR 513; F E Raitt, “*Carloway*: a view from the academy” (2012) SCOLAG 9.

8 Davidson & Ferguson (n 5).

9 Rt Hon Lord Hope, public lecture in Edinburgh, 12 June 2009. See now D Hope, “Corroboration and distress: some crumbs from under the master’s table” in J Chalmers, F Leverick and L Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (2010) 13.

gendered nature and the statistical evidence of its prevalence – that provides the justification for a specific tailored response from the state. Each of these factors might be contested. After all, men can be raped too, and can be violent towards male partners; some women are violent towards intimate partners. However, it is submitted that violence perpetrated by women (whether towards men or other women) is of a wholly different character to the nature of a heterosexual man's violence towards a heterosexual woman.<sup>10</sup> The latter type of behaviour cannot escape from its patriarchal roots no matter how much some prefer to cloak rape as misconstrued consent, or suggest that the commission of domestic violence is moving towards gender equivalence.<sup>11</sup> The gendered nature of the continuum of violence against women cannot be avoided or neutralised.<sup>12</sup>

In considering abolition of corroboration, with one notable exception,<sup>13</sup> the case for special treatment of rape and intimate partner violence has had little attention in the literature. This is surprising given the scathing accusations from opponents that abolition is primarily about pleasing the victims' lobby.<sup>14</sup> One might have expected critics to have examined more thoroughly the merits of the case made by supporters of victims' rights before being so dismissive of their claims. Cairns has rightly queried whether the removal of corroboration would make much practical difference, and has examined some of the unintended consequences of abolition.<sup>15</sup> The corroboration rule has been criticised for its flexibility, but apparently it is not flexible enough, and thus must be abolished. Yet, there is often ample corroborative evidence of offending if only imaginative efforts were made to detect and interpret it and if time were permitted to case-build.<sup>16</sup> In the context of the physical, financial and psychological traps engulfing many victims of violence the idea that abolishing the corroboration rule may, on its own, improve their lot will be unconvincing. On the contrary, abolition may give false hope. It may result in the launch of more prosecutions, but given the evidence of negative public attitudes towards rape victims it is far from certain how juries will react to uncorroborated accounts of violence, sexual or otherwise.<sup>17</sup> Unless prosecutors still continue to seek corroboration in practice to ensure that there is sufficient evidence to satisfy a jury beyond reasonable doubt, the number of not proven verdicts or not guilty verdicts is likely to increase, sending a perverse message to potential complainers.

10 R P Dobash and R Eerson Dobash, "Women's violence to men in intimate relationships. *Working on a puzzle*" (2004) 44 Br J Criminol 324.

11 B Dempsey, "Gender neutral laws and heterocentric policies: 'domestic abuse as gender-based abuse' and same-sex couples" (2011) 15 EdinLR 381.

12 L Kelly, *Surviving Sexual Violence* (1988); World Health Organization, *Global and Regional Estimates of Violence Against Women: Prevalence and Health Effects of Intimate Partner Violence and Non-Partner Sexual Violence* (2010).

13 I M Cairns, "Does the abolition of corroboration in Scotland hold promise for victims of gender-based crimes? Some feminist insights" [2013] Crim LR 540.

14 For example, Bonnington (n 4).

15 Cairns (n 13).

16 L Ellison "Witness preparation and the prosecution of rape" (2007) 27 Legal Studies 171.

17 Scottish Government, *Domestic Abuse 2007/08: Post-Campaign Evaluation Report* (2008).

Space prevents more fundamental questions being addressed here, but abolition of corroboration alone will not cure one of the most pernicious ills affecting a majority constituency in modern Scottish society. Much more could be done to convert the knowledge derived from decades of evidence-based research into sustained effective policies. That would require an approach that placed more emphasis on the systemic qualities of forms of violence towards women and attached less weight to the individual pathology of an offender.

## B. HOW COULD ABOLITION MAKE A DIFFERENCE?

Abolition of corroboration will only make inroads on gendered crime if it is accompanied by a raft of transformative measures that demonstrate leadership from legislators and induce attitudinal change. Examples of such transformative practices exist, such as the establishment of the National Sex Crimes Unit as a specialist body, the existence of which is a precondition of effective case building; and the innovative health-led Sexual Assault Referral Centres (SARCS) in Glasgow and Dundee. Likewise, the Lord Advocate's Domestic Abuse Protocol<sup>18</sup> is an effective tool which implements research based policies to make informed risk assessments in every domestic abuse case where release from detention is considered. There are success stories in other areas where robust corroboration can be hard to find, such as suspected child abuse cases. The development of the joint investigative forensic interview used with children was a major breakthrough. The evidence is that provided the protocols are rigorously followed,<sup>19</sup> the methodical approach it demands is capable of an impressive success rate in producing high quality video-recorded evidence.<sup>20</sup> This shows that careful planning in design and execution of policies can deliver results that were previously elusive. Irrespective of whether corroboration is retained or abolished, and in regard to which types of evidence, the justice system needs to develop more preventative policies and mechanisms such as SARCS to achieve improved outcomes for complainers. Progressive and effective pre-trial mechanisms operate in other jurisdictions, and could be imported to Scots law.<sup>21</sup> For example, greater attention could be devoted to the support afforded to complainers in preparing them for trial. Other adversarial jurisdictions have been less resistant to introducing policies such as the proactive prosecuting programme used in New York.<sup>22</sup> Such a programme appoints a prosecutor to a complainer for continuity and support and to facilitate the complainer to achieve best evidence, whereas in Scotland an arms-length arrangement between prosecutor and complainer

18 Joint Protocol Between Police Scotland and Crown Office and Procurator Fiscal Service, *In Partnership Challenging Domestic Abuse* (2013), available at [http://www.crownoffice.gov.uk/images/Documents/Prosecution\\_Policy\\_Guidance/Protocols\\_and\\_Memorandum\\_of\\_Understanding/Joint%20Domestic%20Abuse%20Protocol%20-%20Oct%2013.pdf](http://www.crownoffice.gov.uk/images/Documents/Prosecution_Policy_Guidance/Protocols_and_Memorandum_of_Understanding/Joint%20Domestic%20Abuse%20Protocol%20-%20Oct%2013.pdf).

19 D La Rooy and S Block, "The importance of scientifically analysing the quality of joint investigative interviews (JIIs) conducted with children in Scotland" 2013 SLT 77.

20 J Spencer and M E Lamb (eds), *Children and Cross-Examination: Time to Change the Rules* (2012).

21 L Ellison (n 16).

22 Ibid.

is the norm. Adoption of this programme in Scotland was rejected in the Crown Office Review in 2006, lest it was interpreted as coaching complainers.<sup>23</sup> Of course, coaching is a legitimate concern, but it cannot be beyond the collective wit of reformers to devise suitable protocols to allay that fear. Otherwise, fear of change will be a constant brake on embracing any change, regardless of its merits.

### C. CONCLUSION

In a recent public speech Lord Carloway observed: “[T]he system of criminal justice which exists in Scotland is one which remains to a large extent geared to the values and conditions of the Victorian age.”<sup>24</sup> In regard to the proposed abolition of corroboration, most interested parties have rejected that characterisation of the criminal justice system and are wary of a modernist agenda. However, it is much harder to resist the tenor of Lord Carloway’s observation when applied to the phenomenon of sexual and physical abuse towards women and children that still pervades modern Scottish society. This is not so much a criticism of the institutional response to abuse, as an unavoidable assessment of the social practices and attitudes that permit it to occur in the first place. If the rancorous debates over corroboration were to galvanise a broader debate about the levels of gender violence in Scottish society, the *Carloway Review* would have an entirely different legacy.

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EdinLR Vol 18 pp 97-104

## Loose Connections: Matters of the Heart and Delictual Liability

### A. THE FACTS

The recent decision by Lord Pentland in the Outer House case of *Shields v Crossroads (Orkney)*<sup>1</sup> deals with an unusual question in the law of negligence: is there ever a duty of care not to engage in a love affair? The pursuer had experienced difficulties in caring for her husband and son, both of whom had serious health complaints. She also had a history of depressive illness and, under the heavy burden of family responsibilities, felt socially isolated. For that reason her local authority referred her in March 2008 to Crossroads (Orkney), a registered charity, whose task was to provide her with respite care, information, support and advocacy services. In

<sup>23</sup> *The Crown Office and Procurator Fiscal Service Review of the Investigation and Prosecution of Sexual Offences in Scotland: Report and Recommendations* (2006) 110.

<sup>24</sup> “Scots criminal evidence and procedure – Meeting the challenges and expectations of modern society and legal thinking”, Murrayfield Conference, Edinburgh, 9 May 2013.

<sup>1</sup> [2013] CSOH 144, 2013 Rep LR 116.